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83-6226

IN THE

UNITED STATES SUPREME COURT

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SUPREME COURT, U.S.

APPEAL FROM THE SOUTH CAROLINA SUPREME COURT

STERLING BARNETTE SPANN,

Appellant,

-vs-

STATE OF SOUTH CAROLINA,

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee would show unto this Court as follows:

I.

This case contains a unique factual situation. On October 5, 1981, the South Carolina Supreme Court altered one of the elements of the common law crime of burglary. State v. Brooks, 277 S.C. 111, 283 S.E.2d 830 (1981). The common law definition of burglary was the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony therein. In Brooks, the court declared that only the intent to commit a crime would be required.

The court said, "any indictment hereafter which charges one with breaking and entering the dwelling of another in the nighttime with intent to commit any crime, a felony or a misdemeanor, is sufficient." 283 S.E.2d at 831 (emphasis added). The present indictment was written on October 19, 1981 (Tr. p. 1359), two weeks after the decision in Brooks. Hence, it could properly have contained the new language, "... with intent to commit a crime therein," although an old form was used which contained the old "felony" language. With Appellant's approval, the indictment was amended so as to conform to the language in Brooks. (Tr. p. 1053, line 12 - p. 1054, line 10). The trial judge's jury instructions defined burglary in accordance with the Brooks definition. (Tr. p. 1131, line 11 - p. 1133, line 18).

The jury convicted Appellant of burglary, robbery, criminal sexual conduct in the first degree and murder.

II.

On appeal to the South Carolina Supreme Court, Appellant argued that his burglary conviction was improper because Bouie v. Columbia, 378 U.S. 347 (1964), prohibits unforseeable and retroactive judicial expansion of the common law.

Appellant then argued that because his conviction for burglary was improper, his sentence of death based on the jury's finding of burglary as an aggravating circumstance was also improper.

III.

Appellee argued that Bouie, supra, prohibits unforseeable and retroactive judicial expansion of a statute. The Bouie decision does not affect a state court's ability to alter the common law. Appellee also argued that Appellant did not receive any conviction or sentence which he would not have anticipated at the time of the offenses. Thus, Appellant's burglary conviction and death sentence were proper.

IV.

In its opinion, State v. Spann, ___ S.C. ___, 308 S.E.2d 518 (1983), the South Carolina Supreme Court held Appellant's argument on this issue to be meritless because, "The amendment of the indictment did not create a greater punishment than would have attached at the time of the offense." The court cited State v. Logan, 277 S.C. 252, 286 S.E.2d 126 (1982), in support of this proposition.

V.

Appellant now seeks an appeal to this Court pursuant to 28 U.S.C. §1257(2), which provides for review by the Supreme Court by appeal "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

VI.

This appeal is not within this Court's jurisdiction because the constitutionality of S. C. Code Ann., §16-3-20(C)(a)(1)(d) was not challenged at trial or on appeal to the South Carolina Supreme Court. Thus, the statute's constitutional validity was not expressly passed on by the South Carolina Supreme Court.

VII.

In Bouie v. Columbia, 378 U.S. 347 (1964), the State Supreme Court had created an "unforseeable and retroactive judicial expansion of narrow and precise statutory language." 378 U.S. at 352. This Court reversed Appellants' convictions on the principle that the due process clause requires a criminal statute to give fair warning of the conduct which it prohibits. At the time the Appellants in Bouie committed the alleged offense, they had no way of knowing that their actions were unlawful.

In light of the South Carolina Supreme Court's holding in the present case that, "The amendment of the indictment did not create a greater punishment that would have attached at the time of the offense," the court's decision was correct under Bouie. Thus, no substantial federal question is presented.

WHEREFORE, pursuant to United States Supreme Court Rule 16, Appellant asks that the Court dismiss this appeal, or in the alternative, that it affirm Appellant's conviction and sentence.

Respectfully submitted,

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April 3, 1984.

CR

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY OF Motion to Dismiss or Affirm HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING 1 COPIES IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID THIS 3rd DAY OF April, 1984

Harold M. Coombs, Jr.
ATTORNEY FOR Appellee

SWORN TO BEFORE ME THIS 3rd DAY OF April, 19 84

Notary Public for South Carolina (L.S.)
My Commission Expires 5/26/86